



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Kwach, Muli & Gicheru JJ A)**

**CIVIL APPEAL NO 3 OF 1992**

**BERNARD MUTONGA MBITHI .....APPELLANT**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA**

**ALI MBARAKI ALI T/A MBARAKI CONTRACTORS .....RESPONDENTS**

(Appeal from an order of the High Court of Kenya at Mombasa

(Mr Justice Shields) dated 28th October, 1991 in HCC Suit

No 755 of 1991)

**JUDGMENTS**

**Kwach JA.** This appeal raises a very important issue of law, namely whether on the facts contained in the affidavit of Bernard Mutonga Mbithi (the appellant sworn on 18th September 1991, he was entitled to be given leave to bring an action against Municipal Council of Mombasa and Ali Mbaraki Ali (the respondents).

The appellant deponed that on 14th April 1988, his son drowned in a pit dug by the second respondent at a school owned by the first respondent His intention right from the beginning was to sue both respondents to recover damages for the death of his son but he did not do so. The appellant said that following the death of his son, an inquest was ordered into the death and this ran from 12th July 1989, until 19th February 1991, when the ruling was delivered. He thought that he could not bring proceedings until the persons found by the magistrate to have been responsible for the death of his son had been charged with a criminal offence. When he consulted his advocate in July 1991, he was informed that he could not sue because the claim was time-barred. The claim against the first respondent, which is a local authority, should have been brought within one year from the date of the accident. This is provided for under section 3 (1) of the Public Authorities Limitation Act (chapter 39) which states:

“3 (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”

Under section 4(2) of the Limitation of Actions Act (chapter 22), the claim against the second respondent should have been brought within three years from the date on which the cause of action accrued The

application by the appellant for leave to file suit out of time was made under sections 27 and 28 of the Limitation of Actions Act, which does not, of course, apply to a local authority. Mr Juma, for the appellant, did not seem to be aware of this. When his attention was drawn to this fact he said he was not seeking any orders against the first respondent.

Shield's J heard the application on 28th October 1991, and in his characteristic brevity, dismissed it holding that he did not think the result of the inquest was a material fact within section 27 of the Limitation of Actions Act.

I must confess that initially I entertained some doubt whether the appellant should have been allowed to prosecute this appeal *ex parte*. It would appear that notwithstanding the provisions of section 27 of the Act, the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an *ex parte* order has been made, can apply to the Court which made the order to set it aside. The Court of Appeal in England in the case of *Cozens v North Devon Hospital Management Committee* [1966] 2 All ER 799, held that although it was a general principle in regard to *ex parte* orders that the party affected by the order could apply for it to be discharged, yet it would be contrary to the intention of the Limitation Act 1963 to allow a defendant to apply, before the trial of the action, to set aside an *ex parte* order obtained under section 2(1) giving leave for the purpose of section 1 (1) (a) of the Act. Lord Denning MR said at page 801:

“Now I quite agree that in general a party affected by an *ex parte* order can apply to discharge it. We applied this rule as of course in *Republic v Morley (Valuation Officer) ep Peachey Property Corporation Ltd* recently; but the procedure under the Limitation Act 1963 is altogether exceptional. It says in terms that an application shall be made *ex parte*. This is a strong indication that the judge is to decide the application on hearing one side only. No provision is made for the defendant being heard; and I do not think that we should allow it to be done at this stage. It must be remembered that, even when the judge grants leave, there is nothing final about it. It is merely provisional. The defendant will have every opportunity of challenging the facts and the law afterwards at the trial. The judge who tries the case is the one who must rule finally whether the plaintiff has satisfied the conditions for overcoming the time bar. He is not in the least bound by the provisional view expressed by the judge in chambers who gave leave.”

And Danckwerts LJ in the same case said at page 804:

“It appears to me that it would be contrary to the clear intention of the Act of 1963 if, once an *ex parte* order has been made, an application to set that order aside could be made before the trial of the action. In the result the general principle in regard to *ex parte* orders has, in my opinion, been excluded.”

*Cozens'* case was cited with approval in this Court's decision in the case of *Yunes Oruta & another v Samwel Nyamato* Civil Appeal number 96 of 1984 (UR). In spite of this, this Court in the case of *David Stephen Gatune v The Headmaster – Nairobi Technical High School and Attorney General* allowed the respondents to be represented in the appeal. In that case, the appellant had applied to a judge *ex parte* under section 28 of the Limitation of Actions Act (cap 22) to be granted leave to file a suit for damages against the respondents. The judge dismissed his application and he appealed to this Court. The record shows that the respondents were represented but the question whether or not they should have been heard at all was never raised and the Court therefore did not deal with the matter. If objection had been taken against their representation, it would almost certainly have been sustained. So in this case, I am satisfied that we took the right decision when we allowed the appellant to proceed *ex parte*.

I will now turn to the substance of the appeal. The reason given by the appellant as to why he did not file a suit was that he thought he was legally obliged to await the outcome of the inquest. He thought he could not bring proceedings before the inquest came to an end. He pleaded ignorance of the law. The issue to be determined in this appeal therefore is whether ignorance of the law can constitute a material fact of a decisive nature within the meaning of section 27 of the Act. The judge, relying on the case of *Mweu v Kabai and another* [1972] EA 24, held that ignorance of the law did not constitute a material fact. In that case the applicant applied for leave to file an action outside the limitation period on the ground that

material facts were outside his knowledge. He had been injured in a traffic accident in respect of his driving and he was subsequently imprisoned. It was contended that it was outside his knowledge that his injuries were attributable to the other driver's negligence, and that he did not know the statutory period of limitation. Trevelyan J held *inter alia* that ignorance of the statutory period of limitation could not be a material fact within the section. He relied on the *dicta* of Salmon, LJ and Cross, JJ in the case of *Drinkwater v Joseph Lucas* [1970] 3 All ER 769. With respect, that decision was correct.

The Court will grant an application for leave to bring an action after the expiry of the normal three-year limitation period if the plaintiff proves that material facts relating to his cause of action were or included facts of a decisive character which were at all times outside the knowledge of the plaintiff until a date which was either after the end of the three-year period or not earlier than twelve months before its end and was, in either case, not more than twelve months before the date on which the action was brought. Material facts are restricted to three categories of fact, namely, (a) the fact that personal injuries resulted from the negligence, nuisance or breach of duty constituting the cause of action; (b) the nature or extent of the personal injury so resulting; and (c) the fact that the personal injuries were attributable to the negligence, nuisance or breach of duty or the extent to which they were so attributable.

It is not sufficient that the facts unknown to the plaintiff should be material within the above definition; they must also be of a decisive character, that is to say, they must be such that a reasonable person, knowing them and having obtained appropriate advice with respect to them, would have regarded them as determining that an action would have a reasonable prospect of succeeding and resulting in the award of damages sufficient to justify the bringing of the action.

Finally, the plaintiff must prove that a material fact of a decisive character was outside his knowledge (actual or constructive).

In *Re Pickles v National Coal Board (Intended Action)* [1968] 1 WLR 997, the proposed plaintiff had been employed as a miner by the proposed defendants from 1947 to 1960, when he changed his employment to that of a lathe operator. In February, 1966 he became ill and in July, 1966 he was informed by his doctor that he was suffering from silicosis contracted during his employment as a miner. He then consulted his trade union, having in mind the only possibility of obtaining a National Insurance Pension, but his papers were mislaid by the union and therefore not considered by the union's legal advisers until June, 1967. In July, 1967 the proposed plaintiff learned for the first time that he might have a claim for damages against the proposed defendants and he thereupon applied for leave under the Limitation Act 1963. It was held by the Court of Appeal, reversing the judge, that although the proposed plaintiff knew that he was suffering from silicosis in July, 1966, the fact that his silicosis was attributable to the negligence of or breach of statutory duty of the proposed defendants was a material fact of a decisive character unknown to him until July 1967. It was also held that, in putting the matter before his trade union, he had taken all such action as it was reasonable for him to take in order to satisfy the requirements of the Act. The case was, therefore, a proper one for leave to be granted and the proposed plaintiff had until July 1968 in which to bring his action.

In the present case, there can be no doubt that the appellant knew right from the start that the death of his son had been caused by negligence and / or breach of duty attributable to the respondents. He did not have to wait for the conclusion of the inquest to make that determination. The fact that he thought this was necessary did not and could not make it a material fact. The application was therefore rightly rejected by the judge. I would dismiss the appeal with no order as to costs.

**Muli JA:** The appellant, Bernard Mutonga Mbithi brought this application by way of Originating Summons citing the respondents, M/s Municipal Council of Mombasa and one Ali Mbaraki Ali trading as Mbaraki Contractors respectively. The application was brought under section 27 and 28 of the Limitation of Actions Act (chapter 22 Laws of Kenya) (the Act) and also under section 3A of the Civil Procedure Act. (chapter 21: Laws of Kenya ) seeking leave of the Court for extension of the limitation period on the ground of ignorance of material facts relating to the cause of action.

Briefly the facts were that the appellant's son drowned in a pit together with another boy while playing on

the grounds of Tom Mboya Primary School ( the School) owned by the first respondent. The second respondent was alleged to have dug the pit in 1988 as the contractors acting as an agent of the first respondent and left the pit uncovered. The pit eventually collected water to form a pool. The first respondent is a Local Authority established under the Local Government Authorities Act (chapter 265: Laws of Kenya).

It was alleged that the deceased, Mutua Bernard Mbithi ) aged 7, together with another boy were playing on the grounds of the school on 14th April 1988 when they slipped and fell in the abandoned pit and drowned. The appellant being the next friend of the deceased boy should have brought action in tort within twelve months and three years respectively for negligence on the part of the owners of the school jointly with their contractor who dug the pit. No such action was brought against the respondents within the statutory periods as provided by the law.

The appellant then took out the Originating Summons on 4th October 1991 seeking leave to file the suit out of time against the respondents. Section 3(1) of the Public Authorities Limitation Act (chapter 39: Laws of Kenya) provides as follows:

“S 3 (1) No proceeding founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.” (underlining is mine)

The 1st respondent, the Municipal Council of Mombasa is such a local authority and any action arising from this fatal incident of 14th April, 1988 should have been brought against the Council (the 1st respondent) within twelve months from that date. It follows therefore that any action, in so far as it concerns the first respondent, is statute barred and accordingly misconceived. Mr Juma conceded this and in any case the appellant did not allege that the cause of non-compliance with this Act was due to any disability within the meaning of section 5 thereof.

With regard to this appeal, in so far as it concerns the second respondent, any action arising from the fatal incident should have been brought within three years from 14th April, 1988. This was not done and the appellant sought leave of the superior court for extension of the time to enable him to file the intended suit out of time. In his affidavit in support of the chamber summons he deponed that he believed that he could not institute a common law claim against the respondents before the decision of the inquest which was held to establish the persons liable for the death of his son. The inquest had commenced on 12th July, 1989 and ended on 6th November, 1990. The ruling was delivered on 19th February 1991. The appellant therefore deponed that the delay in instituting action against the respondents was due to his mistaken belief, in relation to the proceedings and the outcome of the inquest and also due to his ignorance of the material facts relating to the common law claims founded on tortious acts.

In his ruling, on the application in the superior court, the learned trial judge refused the application saying:-

“I do not think the result of the inquest was a material fact within the section.”

He then granted leave to appeal.

The appellant appealed to this Court on two main grounds, namely:

1. The learned judge erred in law and failed to exercise his discretion in the appellant’s favour.
2. The learned judge erred in law in failing to consider the circumstances surrounding the delay in filing suit.

Before I consider these grounds of appeal on merit I would like to consider one aspect which was brought put *per in curium*: whether an appeal lies from the ruling made under sections 27, 28 and 30 of the Limitation of Actions Act and if this is in affirmative whether the tortfeasor should be served with the Notice of Appeal, the Record of the proceedings, the judgement / ruling and the Hearing Notice of the

appeal.

I find little difficulty in the first limb of this issue. Unless any appeal from the superior court is prohibited by law, part IV of the Rules of this Court provides for appeals from the superior court acting in its original and appellate jurisdictions in civil cases and to matters relating thereto (see rule 73) and any person who desires to appeal to this Court to give notice in writing to the Register of the superior court (see rule 74 (1)). It follows therefore that this court has jurisdiction to hear appeals from the decision of the superior court founded under sections 27 and 28 of the Limitation of Actions Act.

The second limb of the issue has given me some difficulty. Section 28 of the Act provides:

“28 (1) An application for leave of the Court for the purposes of section 27 shall be made *ex parte*, except in so far as the Rules of court may otherwise provide in relation to applications made after the commencement of a relevant action.”

(underlining is mine).

While it is clear that applications for leave of the superior court for extension of time under section 27 and 28 of the Act should be made *ex parte*, it is not so clear as to whether an appeal from the decision of the superior court to this Court should also be made *ex parte* or not. The order for extension of time, in essence, is a provisional order which does not deal with liability. If the *ex parte* order is granted, the intended defendant will have the opportunity to challenge the facts and the law. The intended defendant, although cited in the application, is not yet an active party until the suit is filed following the order. Technically, the aggrieved party would only be the intended applicant/plaintiff if the order is refused. If the aggrieved applicant/plaintiff is aggrieved by the decision of the superior court on the *ex-parte* application, he has a right of appeal to this court. The only issue is whether he should serve appeal papers to the intended defendant and whether the appeal should be heard *ex parte*. I may put the issue simply, as to whether the appeal from the decision of the superior court in an application founded under sections 27 and 28 of the Act is to be heard *ex parte*. The only party which may be aggrieved by the decision of the superior court is the applicant/plaintiff. The intended defendant / respondent is still not an active party. It follows, therefore, that an appeal from that decision may be heard *ex parte* without the necessity of the intended defendant being served with the appeal documents and hearing notice of appeal. This is so because the jurisdiction of this court is limited to the original and appellate jurisdictions of the superior court. To bring in the intended defendant would be to extend that jurisdiction contrary to rule 73 of the Rules of this court. Unlike the applications founded under order 50 of the Civil Procedure Rules for prerogative orders of *mandamus* and *certiorari*, where a special procedure is provided for applications founded under section 27, 28 and 30 of the Limitation of Actions Act. The result would appear to me to be that the appeal from the decision of the superior court to this court should also be heard *ex parte* and the intended defendant need not be served with any appeal documents.

In ground one of the Memorandum of Appeal, the appellant complained that the learned judge erred in failing to exercise his discretion in the appellant's favour. While it is trite law that the superior court has unlimited inherent jurisdiction under section 3A of the Civil Procedure Act, it is also trite law that such inherent jurisdiction should only be invoked where there exist no provisions regulating the procedure in civil cases. Section 27(2) of the Limitation of Actions Act, provides as follows.

“(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to the cause of action were included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:-

(a) either was after the three – year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) in either case, was a date not earlier than one year before the date on which the action was brought.”

The appellant/plaintiff must prove material facts relating to the cause of action or included facts of a

decisive character which were outside his knowledge (actual or constructive) until after the three- year limitation period or not earlier than one year before the end of that period. The appellant/plaintiff contends that he was waiting for the outcome of the inquest and that he did not know that he could institute action before the outcome of the inquest was known. I do not agree that this explanation fulfills the statutory requirements of section 27(2) of the Limitation of Actions Act. He knew all along or ought to have known that Tom Mboya Primary School was owned by the 1st respondent. The fatal pit or trap was on the grounds of the school. Within a few days of the tragedy he would have found out from the police, who investigated the incident, as to who was responsible for the digging of the pit. The appellant did not show any reasons for his inability to find out who the tortfeasors were. He was in full knowledge (actual or constructive) of the tortfeasors. This being a statutory requirement that he so proves the material facts or included decisive facts related to the cause of action he could not properly invoke the inherent jurisdiction of the Court. The inherent jurisdiction of the Court may only be invoked where there are no provisions exist. This is not the case in the instant case. Ground 1 of the Memorandum of Appeal fails.

In ground 2 of the Memorandum of Appeal, the appellant complains that the learned trial judge erred in failing to consider the circumstances surrounding the delay in filing the suit. On this ground Mr Juma for the appellant urged us to hold that the circumstances surrounding the delay in filing the suit fell under the interpretation provided under section 30 of the Act. Section 30 of the Limitation of Actions Act is as follows:-

“30(1) In sections 27, 28 and 29 of the Act, any reference for the material facts relating to a cause of action is a reference to one or more of the following:-

- (a) the fact that personal injuries resulting from the negligence, nuisance or breach of duty constituting that cause of action ;
- (b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty;
- (c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.”

These material facts were within the actual knowledge of the appellant within the prescribed period.

The learned trial judge held that the result of the inquest was not “ a material fact within the section”. The only reason given by the appellant was that he did not know that he could institute action before the outcome of the inquest. The fatal incident occurred on 14th April 1988. The ruling was delivered on 19th February 1991. During the intervening period , the appellant took no reasonable steps to obtain appropriate advice from a legal practitioner. He may be illiterate but that reason would not avail him of the interpretation of sections 27,28 and 29 of the Act as read with section 30 of the Act and in particular subsection (2) thereof. I do not consider that the learned judge misapprehended the law in arriving at that conclusion. I also hold that ignorance of the law was not a material fact of a decisive character relating to the cause of the intended action. The appellant knew the tortfeasors well within the prescribed period. As a reasonable man, he could have sought legal advice well within time to protect his right. This application was brought on 28th November 1991, ten months after the ruling of the inquest which was delivered on 19th February, 1991. The appellant’s conduct as regards the material facts of the decisive character as well as his failure to seek legal advice cannot be regarded as that of a reasonable and prudent person. The death of his son called for vigilant and reasonable steps to be taken to ensure that the tortfeasors were sued for their negligence.

In the result I would dismiss this appeal with no order as to costs.

**Gicheru JA:** I have had the advantage of reading in draft the judgments of Kwach and Muli, JJ A . I agree that this appeal be dismissed with no order as to costs. It is so ordered.

Dated and Delivered at Nairobi this 22<sup>nd</sup> day of January, 1993

**R.O. KWACH**

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**JUDGE OF APPEAL**

**M.G. MULI**

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**JUDGE OF APPEAL**

**J.E. GICHERU**

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**JUDGE OF APPEAL**